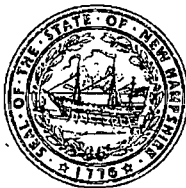


ATTORNEY GENERAL  
DEPARTMENT OF JUSTICE

33 CAPITOL STREET  
CONCORD, NEW HAMPSHIRE 03301-6397

JOSEPH A. FOSTER  
ATTORNEY GENERAL



ANN M. RICE  
DEPUTY ATTORNEY GENERAL

October 16, 2013

William S. McGraw, Clerk  
Merrimack County Superior Court  
163 North Main Street  
Concord, New Hampshire 03301

Re: State of New Hampshire v. Priceline.com, Incorporated, et al.  
Docket No. \_\_\_\_\_

Dear Mr. McGraw:

Enclosed for filing please find an original plus 24 copies of a *Complaint*. Please issue Orders of Notice and return to the undersigned for proper service on the defendants.

Thank you for your cooperation in this matter. Please call if you have any questions.

Sincerely,

*Philip B. Bradley*  
Philip B. Bradley  
Assistant Attorney General  
(603) 271-3679

/cmc  
Enclosures

SUPERIOR COURT  
2013 OCT 16 AM 9 33

STATE OF NEW HAMPSHIRE

MERRIMACK, SS.

SUPERIOR COURT

No. \_\_\_\_\_

State of New Hampshire

v.

Priceline.com, Incorporated;  
Travelweb, LLC  
Trip Network, Inc.;  
Orbitz, LLC;  
Internetwork Publishing Corp. d/b/a Lodging.com;  
Expedia, Inc. (WA);  
Hotels.com, LP;  
Hotwire, Inc.;  
Egencia, LLC;  
Travelocity.com, LP;  
Site59.com, LLC;  
and  
Does 1 through 100, Inclusive

**COMPLAINT**

NOW COMES the State of New Hampshire ("State"), by and through counsel, the Office of the Attorney General, and complains as follows against the above-captioned defendants.

**I. INTRODUCTION**

1. The State brings this action against Defendants for their past and continuing conduct within New Hampshire, including the failure to remit the full and proper amounts of taxes on overnight accommodations within New Hampshire and motor vehicle rentals picked up at New Hampshire locations as required by the Meals and Rooms Tax Law, RSA chapter 78-A, and for engaging in unfair and deceptive trade practices prohibited by the Consumer Protection Act, RSA chapter 358-A.

2. Defendants are online travel companies ("OTCs") that contract or partner or associate with New Hampshire hotels and/or national chains having hotels in the State to acquire rights to hotel rooms within New Hampshire for subsequent rentals to others. Defendants first acquire/buy New Hampshire hotel rooms and hotel room rights from hotels/hotel chains at low wholesale rates, and second, rent the New Hampshire rooms arranged or acquired for rental to consumers (transient guests) at higher retail rates. By the terms of the Meals and Rooms Tax Law, Defendants are required to collect and remit to the State a 9 percent tax for each retail rental of a hotel room to consumers (the transient guest) based upon the gross amount paid by the consumer. Although Defendants charge consumers the taxes based on the higher retail rate (or more), *Defendants do not remit the Meals and Rooms Tax directly to New Hampshire and only a portion of the Tax is ever paid to the State.* In some instances, Defendants do not remit even a portion of the tax. Defendants engage in the same practice with respect to rental cars.

3. Defendants' acts of tax evasion and deceptive business practices within the State give rise to the State's claims herein for: (1) Declaratory Judgment; (2) Injunctive Relief; (3) Violation of the Rooms and Meals Tax; (4) Violations of the Consumer Protection Act; (5) Breach of Fiduciary Duty; (6) Accounting; (7) Conversion; (8) Unjust Enrichment; (9) Assumpsit for Money Had and Received; (10) Civil Conspiracy; (11) Imposition of Constructive Trust; and (12) Damages.

## II. PARTIES

4. The Plaintiff is the State of New Hampshire, acting through its Attorney General, Joseph A. Foster.

5. The Attorney General is authorized to bring this action "at the instance of the commissioner of revenue administration in the name of the [S]tate to recover the amount of

taxes, penalties, and interest due from the [O]perator[.]” RSA 78-A:20, II. There is no statute of limitations in this suit to collect taxes, penalties, interest and costs given that Defendants have failed to file a return when the return was due. *See* RSA 78-A:20 (“The limitation of 3 years in this section does not apply to a suit to collect taxes, penalties, interest, and costs when the operator filed a fraudulent return or failed to file a return when the return was due”).

6. The Attorney General is further authorized to bring an action in the name of the State “to restrain by temporary or permanent injunction” the use of trade or commerce in the event he “has reason to believe that trade or commerce declared unlawful by this chapter has been, is being or is about to be conducted by any person.” RSA 358-A:4, III(a). The Attorney General also “may petition the court for an order of restitution of money or property to any person or class of persons injured thereby.” *Id.* “Person” is defined as including, “where applicable, natural persons, corporations, trusts, partnerships, incorporated or unincorporated associations, and any other legal entity.” RSA 358-A:1, I.

7. The Defendants can be grouped into four distinct groups, as subsidiaries or indirect subsidiaries of the following: Priceline; Orbitz; Expedia; and Travelocity.

**A. The Priceline Defendants**

8. Defendant *priceline.com, Incorporated* (“Priceline”) is a Delaware corporation with its principal place of business at 800 Connecticut Avenue, Norwalk, CT 06854. Its registered agent is Lexis Document Services, Inc., 2711 Centerville Road, Suite 400, Wilmington, DE 19808. *Lowestfare.com LLC* (formerly known as *Lowestfare.com Incorporated*) (“Lowestfare”) is a wholly-owned subsidiary of Defendant Priceline.

9. *Defendant Travelweb, LLC* ("Travelweb") is a Delaware limited liability corporation with the same principal place of business and registered agent as Defendant Priceline. Defendant Travelweb, LLC is a wholly-owned subsidiary of Lowestfare.

**B. The Orbitz Defendants**

10. *Defendant Trip Network, Inc.* ("Trip Network") is a Delaware corporation with its principal place of business at 500 W. Madison Avenue, Suite 1000, Chicago, IL 60661. Its registered agent is Corporation Service Company, 1201 Hays Street, Tallahassee, FL 32301. Defendant Trip Network does business as Cheaptickets.com.

11. *Defendant Orbitz, LLC* is a Delaware limited liability company with the same principal place of business and registered agent as Defendant Trip Network. Orbitz, Inc. is the immediate parent company of Defendant Orbitz, LLC.

12. *Defendant Internetwork Publishing Corp.* ("Internetwork") is a Florida corporation with the same principal address and registered agent as Defendant Trip Network. Defendant Internetwork did business as Lodging.com.

13. Between approximately 2004 and 2007, when it was Cendant Travel Distribution Services Group, Inc., Travelport, Inc. was the immediate parent company of Defendant Trip Network and Defendant Internetwork as well as the indirect parent company of Defendant Orbitz, LLC.

14. Defendant Orbitz, LLC, Defendant Trip Network, Defendant Internetwork and Orbitz, Inc. are subsidiaries of Orbitz Worldwide, Inc.

**C. The Expedia Defendants**

15. *Defendant Expedia, Inc. (WA)* ("Expedia (WA)") is a Washington corporation with its principal place of business at 10900 N.E. 4<sup>th</sup> Street, Bellevue, WA 98004. Its registered

agent is National Registered Agents, Inc., 160 Greentree Drive, Suite 101, Dover, DE 19904. Effective December 9, 2008, Hotels.com, Inc., a Delaware corporation, merged into Defendant Expedia (WA). Effective December 31, 2008, TravelNow.com, Inc., a Delaware corporation, merged into Defendant Expedia (WA). Hotels.com, Gp, LLC and Defendant Hotwire, Inc. are wholly-owned subsidiaries of Defendant Expedia (WA).

16. *Defendant Hotels.com, L.P.* is a Delaware limited partnership with its principal place of business at 10440 N. Central Expwy, Suite 400, Dallas, TX 75231. Its registered agent is National Registered Agents, Inc., 1021 Main Street, Suite 1150, Houston, TX 77002.

17. *Defendant Hotwire, Inc.* ("Hotwire") is a Delaware corporation with its principal place of business at 655 Montgomery Street #600, San Francisco, CA. Its registered agent is the same as that of Defendant Expedia (WA).

18. *Defendant Egencia, LLC* ("Egencia") is a Nevada limited liability company with the same principal place of business as Defendant Expedia (WA). Its registered agent is National Registered Agents, 505 Union Avenue S.E., Suite 120, Olympia, WA 98501.

19. Travelscape, LLC and Defendants Expedia, Inc. (WA), Hotels.com, LP, Hotwire, Inc., and Egencia, LLC are sister companies ultimately owned by Expedia, Inc. (DE) ("Expedia (DE)").

**D. The Travelocity Defendants**

20. *Defendant Travelocity.com, LP* is a Delaware limited partnership with its principal place of business at 3150 Sabre Drive, Southlake, TX 76092. Its registered agent is Corporation Service Company, Centerville Road, Suite 400, Wilmington, DE 19808.

21. *Defendant Site59.com LLC* ("Site59") is a Delaware limited liability company with the same principal place of business and registered agent as Defendant Travelocity.com, LP.

22. Travelocity.com LLC (formerly Travelocity.com, Inc.) is the general partner of Defendants Travelocity.com LP and Site59.com LLC.

23. Travelocity.com, LLC and Defendants Travelocity.com, LP and Site59.com, LLC are indirect subsidiaries of Sabre Holdings Corporation ("Sabre").

24. The true names and capacities, whether individual, corporate, associate or otherwise, of each of the Defendants designated herein as a Doe are unknown to New Hampshire at this time and therefore said Defendants are sued by such fictitious names. The State will ask leave of the Court to amend this Complaint to show their true names and capacities when the same have been ascertained. The State is informed and believes, and alleges, that each of the Defendants designated herein as a Doe is legally responsible in some manner (including under the laws of agency) and liable for the events and practices herein alleged and, as such, proximately caused damages to the State as hereinafter further alleged.

### **III. JURISDICTION AND VENUE**

25. This Court has jurisdiction over the allegations raised in this complaint pursuant to RSA 491:7. All Defendants regularly transact business within and profit by virtue of business within New Hampshire and the claims asserted herein arise from their business conducted within and relating to this State. All or a substantial part of the transactions and conduct giving rise to the causes of action plead herein occurred in New Hampshire. The Defendants have transacted – and continue to transact – substantial business within and relating to the State, and possess general and specific contacts with this jurisdiction.

26. Venue in Merrimack County is appropriate where, as here, the Defendants are nonresidents. RSA 78-A:20, II; RSA 358-A:4, III-a; RSA 507:9.

#### IV. SUBSTANTIVE ALLEGATIONS

##### A. General Allegations

27. Defendants, each of them, are online sellers and/or online resellers and/or online renters of hotel rooms and motor vehicles to the public. Defendants sold and/or provided and/or rented hotel rooms and motor vehicles to the public within New Hampshire, but failed to pay Meals and Rooms Tax on their rental/sales of New Hampshire hotel rooms and motor vehicles.

28. The Meals and Rooms Tax Law includes a tax on each occupancy at a rate of "9 percent of the rent." RSA 78-A:6, I.<sup>1</sup>

29. "Occupancy" is broadly defined as "the use or possession, or the right to the use or possession, of any room in a hotel for any purpose, or the right to use or possession of the furnishings or to the service and accommodations accompanying the use and possession of a room." RSA 78-A-3, VI(a).

30. The term "rent" is broadly defined and includes "[t]he consideration received for occupancy valued in money, whether received in money or otherwise, including all receipts, cash, credits, and property, or services of any kind or nature, and also any amount for which the occupant is liable for the occupancy without any deduction of any kind." RSA 78-A:3, VIII(a).

31. Thus, the amount of Meals and Rooms Tax on hotel rooms sold/rented in New Hampshire should be correctly calculated as a percentage of the gross amount each consumer occupant (the transient guest) pays each Defendant for a hotel room. That is the amount each Defendant is required to remit to the State.

32. Two parties cannot accomplish indirectly what one cannot accomplish directly under New Hampshire's tax laws. Specifically, when a hotel sells/rents a room itself, taxes are due on retail amounts without any deduction for marketing or services relating to that rental. If a

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<sup>1</sup> Tax of 8 percent prior to July 1, 2009.

hotel contracts with another company to sell/rent rooms, the tax basis remains the same, *i.e.*, the full amount paid by the customer/occupant. Marketing and service costs are not deductible, just as they are not in the case of direct rentals by a hotel.

33. The Meals and Rooms Tax Law also includes a tax of 9 percent "upon the gross rental receipts of each rental" or the "value received or promised as consideration to the owner of a motor vehicle for rental of the vehicle," but not "(a) Separately stated charges for insurance; (b) Charges for damages to the motor vehicle occurring during the rental agreement; or (c) Separately stated charges for motor fuel sold by the owner of the motor vehicle." RSA 78-A:6, II-a;<sup>2</sup> RSA 78-A:3, XVI.

34. Defendants are liable to the State for said Meals and Rooms Tax whether or not they charged and collected said taxes from the ultimate occupier of the New Hampshire hotel room or user of the motor vehicle, as the collection of such taxes are not optional.

35. Defendants are generally charging and collecting retail tax charges that they call "tax recovery charges" (including room and vehicle rental taxes) from consumers that are not being remitted by Defendants to the State. The tax charges are being paid by the consumer occupants to Defendants and ostensibly collected on behalf of New Hampshire.<sup>3</sup> Defendants are also bundling the tax charges with alleged "fees" in order to disguise how much they actually remit in taxes.

36. Defendants contract with hotels for New Hampshire rooms and motor vehicle suppliers for motor vehicles to be picked up in New Hampshire at negotiated discounted rates.

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<sup>2</sup> Tax of 8 percent prior to July 1, 2009.

<sup>3</sup> The Defendants often argue that they really only collect taxes on the wholesale amounts. However, they fail to acknowledge the truth, which is that their "taxes and fees" lines are bundled charges designed to approximately equal or exceed taxes on the hotel rooms' retail amounts. The algorithms Defendants use were specifically created to mimic the retail tax charges paid by other sellers of hotel rooms (including the hotels themselves), even though after collecting such charges, the Defendants only pay a smaller amount to the hotels for taxes. The difference, or spread, creates illegal profit for the OTCs.

Defendants then mark up the prices of rooms and motor vehicles and rent the rooms to transient guests within the State, who actually occupy the rooms within the State, and the motor vehicles to customers who actually use the motor vehicles within the State. The retail tax charges (that Defendants often call "tax recovery charges") are paid by the New Hampshire guests based on the marked up rates. However, New Hampshire only receives tax revenues based on the lower, negotiated room or motor vehicle rates. The Defendants pocket the difference.

37. For example, in a hotel room scenario, if a consumer pays Expedia.com \$100.00 for a room in a hotel located in Concord, New Hampshire, Expedia.com calculates the tax charges based upon the amount the consumer pays – "gross amount" (\$100.00). Expedia.com however, obtains that room at a lower "net" rate, for instance, \$60.00. Because Defendants act as retailers and/or agents, and/or combinations of individuals, the amount of Meals and Rooms Tax due is 9% of \$100, or \$9.00. However, in most cases, the amount of Meals and Rooms Tax remitted to the State by Defendants has been and is based on the lower "net" rate. In this example, New Hampshire would only receive \$5.40 (9% of \$60.00), an underpayment of the tax liability by \$3.60. Thus, in this single example, New Hampshire's collected Meals and Rooms Tax would be 40% less than the tax charges that the Defendants actually collect.

38. All of the Defendants commonly utilize this practice when offering hotel rooms in New Hampshire for sale. The actual charges shown to the occupant are telling. The online travel companies show the customers a line pertaining to taxes but fail to pay that amount of money to the State. For example, the Holiday Inn located in Concord, New Hampshire selling rooms on its website presents charges as shown on the left, while Expedia.com presents its charges as shown on the right:

<u>A</u>		<u>B</u>	
<u>IHG.com Booking</u> (Holiday Inn Concord)		<u>Expedia.com Booking</u> (same hotel)	
Room Rate:	\$139.00	Room Rate:	\$139.00
Total Tax:	\$ 12.51	Taxes and Fees:	\$ 12.93
Estimated Total Price:	\$151.51	Trip Total:	\$151.93

See Expedia.com Transaction attached as Exhibit A. In this example, the State receives \$12.51 (9 percent x \$139.00) from the transaction in Column A and should receive the same amount from the Expedia.com transaction in Column B.

39. Instead, Expedia.com transmits some lesser amount for the room that is determined by its confidential contracts plus 9 percent of that lesser amount as so-called "tax recovery charge."

40. Neither the amount paid by Expedia.com for the room nor the amount paid for taxes is revealed to the customer.

41. The Defendants attempt to disguise their deceptive trade practice within New Hampshire by improperly bundling their private profits (disguised as a "fee") with taxes, such that the occupant cannot determine how much they paid in taxes. See Exhibits B ("Orbitz Transaction"), C ("Priceline Transaction"), and D ("Travelocity Transaction").

42. The motor vehicle rental scenario works much the same except that the rental of the motor vehicle within New Hampshire through Defendants may be in addition to other travel simultaneously booked through Defendants, such as air or hotel, as part of travel packages.

43. Defendants have failed to remit the full Room and Rental Vehicle Taxes due and owing to the State and their conduct continues.

44. Defendants' business practices include charging the general public (transient guest or rental motor vehicle user) a combined taxes and service fee on the rental of each hotel room or motor vehicle within the State.

45. The general public is led to believe Defendants are remitting the correct amount of Meals and Rooms Tax and other hotel taxes to the State.

46. Defendants, however, are improperly calculating their tax liabilities based upon the amount Defendants paid the hotel for the room or the rental vehicle supplier for the car, not upon the gross amount the general public paid Defendants for the rental within the State.

47. As a result, the Meals and Rooms Tax liabilities paid by the general public (i.e., transient guests and motor vehicle users within the State) and owed to the State are underpaid/unpaid by the Defendants, who unlawfully pocket the difference.<sup>4</sup>

48. These practices deprive New Hampshire and its citizens of the full amounts due and owing from the rental of each New Hampshire hotel room or motor vehicle picked up in New Hampshire. In short, Defendants collect greater tax line item amounts from the general public than are remitted to the State.

49. In addition to failing to properly pay collected or owed Meals and Rooms Tax, Defendants do not delineate to the general public the amount being paid for the Tax, other taxes, and the amount, if any, being paid separately as "service fees."

50. The funds collected by the Defendants from the purchaser "become from the time due and payable to the commissioner of revenue administration a personal debt from the operator [i.e., Defendant] liable to pay them to the [S]tate to be recovered in an action of debt." RSA 78-A:20, I.

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<sup>4</sup> These unpaid/underpaid taxes that are due and owing under the Meals and Rooms Tax Law are hereinafter referred to as "Tax Monies Due and Owing."

51. Defendants require that the hotels/hotel chains not reveal to the general public what Defendants paid for the hotel room. Likewise, the hotels do not know what the general public paid Defendants for the hotel room.

52. Similarly, when a customer rents a motor vehicle to be picked up in New Hampshire online through Defendants, he or she will not typically see the cost the motor vehicle supplier charged for the car, the markup by Defendants or the amount they are paying for taxes.

53. Instead, these amounts are bundled with other amounts to disguise what the customer is paying for each.

54. The only way for the hotel or motor vehicle supplier to pay the correct Meals and Rooms Tax to the State is if Defendants inform the hotel or motor vehicle supplier of the gross amount for which the hotel room or motor vehicle was actually rented to the consumer by Defendants and to submit to the hotel or motor vehicle supplier the additional Tax owed to the State (and which was actually paid by the consumer to Defendants).

55. Defendants never remit Meals and Rooms Tax directly to New Hampshire.

**B. Defendants' Statements Regarding the "Merchant Model"**

56. In recent years, the internet travel industry has seen explosive growth. By some estimates, more than half of all hotel bookings in the United States are made online, many through internet travel companies owned by the Defendants.

57. Through their web portals, the Defendants allow consumers to rent hotel rooms in many different hotels throughout the country and the world.

58. The Defendants offer their services to hotels and consumers through two different business models: the "Agency Model" and the "Merchant Model."

59. Upon information and belief, the Merchant Model represents a majority of the Defendants' total online bookings.

60. The two models are described in the 2002 annual report of Defendant Expedia, Inc. as filed with the Securities and Exchange Commission on Form 10-K on March 31, 2003, and the 2004 Annual Report on Form 10-K as filed with the SEC of IAC/InterActive Corp. (the parent company – at that time – of Expedia.com, Hotwire.com and Hotels.com), at 9.

61. Under the Merchant Model, the Defendants do not function merely as service providers collecting a fixed transaction fee. Rather, the Merchant Model consists of two related transactions whereby an internet travel company, including each of Defendants: (i) first purchases and takes title to inventories of hotel rooms at negotiated rates from the hotels ("wholesale" rates); and (ii) then re-sells the rooms to consumers at higher rates ("retail" rates), keeping the difference, along with the service fees, as profit. The Defendants purchase rooms from hotels at the lower wholesale rate using their own credit cards. The selling hotels collect and remit to the applicable taxing authority hotel room taxes based on that lower wholesale rate.

62. The Defendants then rent hotel rooms to consumers at a higher retail rate; the consumers pay through a credit card transaction in which the particular Defendant is the merchant of record.

63. In their transactions with consumers, the Defendants charge retail tax amounts sufficient to cover the applicable hotel room taxes, but do not remit any such taxes to the taxing authority.

64. These merchant transactions were described in public filings by Expedia as follows:

Under the merchant model, we receive inventory (hotel rooms, airline seats, car rentals, destination services) from suppliers at negotiated rates. We determine

the retail price paid by the customer and we then process the transactions as the merchant of record for the transaction. Acting as a merchant enables us to achieve a higher level of gross profit per transaction compared to the agency model and allows us to provide better prices to customers compared to agency transactions. Merchant transactions comprised 58% of our total revenues in 2002 and are derived from the difference between what we pay for the inventory and what we charge the customer.

Expedia (DE) Annual Report (Form 10-K) (Mar. 31, 2003), at F-3 (emphasis added).

65. Similarly, Priceline.com specifically admitted that it actually “purchases” and “takes title” to hotel rooms before reselling them to end users:

For most of these transactions, we establish the price we will accept, have total discretion in supplier selection, purchase and take title to the particular product and are the merchant of record. Consumers agree to hold their offers open for a specified period of time to enable us to fulfill their offers from inventory provided by participating sellers. Once fulfilled, offers generally cannot be canceled. (Emphasis added.)

Priceline.com, Annual Report (Form 10-K) (Mar. 15, 2003), at 29.

66. Hotels.com also identified itself as a “reseller” of hotel rooms obtained from the hotels:

We contract with hotels and other lodging properties in advance for volume purchases and guaranteed availability of rooms at wholesale prices and resell these rooms to consumers through our websites, third-party affiliated websites and our toll-free call centers.

Hotel Reservations Network, Inc. Annual Report (Form 10-K) (Apr. 2, 2001) at 3, 18 (emphasis supplied).

67. Similarly, Orbitz admitted that it “receive[s] inventory directly from a hotel” that it “then mark[s]-up and sell[s] to consumers:”

Our hotel agreements include ... merchant hotel contracts with certain hotels, hotel management groups and hotel chains that give us access to discounted negotiated rates that we then mark-up and sell to consumers on a prepaid basis.

\* \* \*

Our strategy calls for us to increase the number of hotel rooms we can offer under our Orbitz Merchant Hotel program based on merchant arrangements we make directly with individual hotel properties and independent chains. Under the Orbitz Merchant Hotel program, we receive inventory directly from a hotel at a negotiated rate, and we determine the retail price at which we choose to offer it to the consumer.

\* \* \*

We must also pay net rates to hotels in the event merchant hotel bookings sold on our website are purchased fraudulently.

Orbitz, Inc. Annual Report (Form 10-K) (Mar. 18, 2004) at 11, 28, 74 (emphasis supplied). This provision demonstrates that Defendant Orbitz did assume the risk of loss in certain of these sale transactions.

68. Likewise, Travelocity.com, Inc. also distinguished its purchase and re-sale transactions under the Merchant Model from those where it merely provided a service:

In order to increase its sales of higher margin products, Travelocity's business plan calls for it to increase merchant model sales pursuant to which Travelocity serves as the merchant of record in the transaction rather than as a sales agent. In the merchant business, suppliers make inventory, such as airline seats, hotel rooms, car rentals, cruises, and vacation packages, available to Travelocity at wholesale or "net" rates. The merchant of record then sets the retail price that the customer pays and processes the transaction. The merchant business generally delivers higher revenue per transaction than comparable sales under the agency model, in which Travelocity acts as an agent in the transaction, passing a customer's reservation to the travel supplier and receiving a commission from the supplier for its services.

Travelocity.com, Inc., Annual Report (Form 10-K) (Mar. 26, 2002) at 7 (emphasis supplied).

69. As Defendants have admitted in these sworn public filings, Defendants collect the hotel rental charges from consumers.

70. Defendants all employ the Merchant Model. By using this business model to acquire title and rights to large blocks of hotel rooms, Defendants are able to negotiate a lower, "wholesale" purchase or lease price from the hotels.

71. Defendants then re-sell or re-lease the hotel rooms to consumers at a substantially higher "retail" rate.

72. This purchase and re-sale "Merchant" business model is more profitable for the Defendants, and has become their dominant business paradigm in recent years.

73. Due to the contractual or factual relationship between the Defendants and the hotels, the Defendants and the hotels act on behalf of each other to provide/sell customers Lodging, and are thus, agents of one other and combinations of individuals under the law. The Defendants and the hotels join in a common undertaking to sell hotel rooms for their mutual benefit with the understanding that they are to share, to some degree, in the profits or losses generated. As such, they operate as joint enterprise members and, thus, the Defendants have joint enterprise membership liability.

74. Upon information and belief, there are occasions where Defendants unlawfully retain *all* monies charged to and collected from consumers renting hotel rooms and motor vehicles within New Hampshire as revenue without remitting *any* taxes to the State. Known in the industry as "breakage," the situation arises when a consumer books and prepays a Defendant for a hotel room or motor vehicle rental, and all monies (including Meals and Rooms Tax) are collected, but the Defendant never remits *any* tax monies to the State.

75. For example, in a no-show scenario, where a consumer books and prepays a hotel or rental car supplier directly for the room or motor vehicle rental but neither shows up nor timely cancels, the hotel retains the room rate and rental car supplier retains the motor vehicle rental rate but still remits the applicable Meals and Rooms Tax to the State.

76. However, if a consumer books and prepays with an OTC Defendant for a New Hampshire hotel room or motor vehicle to be picked up within New Hampshire, and neither

shows up nor timely cancels, the OTC Defendant retains all monies paid by the consumer, including the Meals and Rooms Tax and other taxes charged to and collected from the consumer. In both of these scenarios, the State is entitled to the full amount of taxes collected from the consumer at the time the transaction occurs, as the Defendants have a duty to remit the taxes regardless of any invoicing irregularities that may occur in a no-show scenario.<sup>5</sup>

**C. Defendants Developed Intentionally Misleading Tax Practices**

77. Years ago, the Defendants recognized an opportunity. They decided that if they collected taxes at retail (which is what customers expect to pay), but paid taxes at wholesale, they could make lots of money on the "spread." They could simply multiply the tax rate times the retail price when charging customers, but multiply the tax rate times the net cost when paying hotels. They realized, though, that if they handled (or continued handling) things this way on their books, it would be illegal, and obviously so. Therefore, the Defendants developed an "opaque" scheme to make it less obvious.

78. Under this scheme, step one involved charging customers "tax money" that appeared to be in line with simply multiplying the tax rate times the retail price. Step two involved remitting taxes on the wholesale rates and pocketing the difference. However, to disguise things, the Defendants developed algorithms and then made up "service fees" and surcharges to act as camouflage, to make up the difference.

79. These algorithms, service fees, and surcharges bore no relation to any services. Instead, these tools were really just roundabout ways to effectively charge taxes at retail without saying it.

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<sup>5</sup> A Texas jury deemed the Defendants' practices illegal, including their "breakage" activities, and awarded more than \$20 million in total to Texas local governments. The April 4, 2013 Final Judgment awarded the City of San Antonio and similarly situated Texas cities \$55,146,489 in total damages, penalties and interest. "Breakage" damages are also being paid in Georgia, pursuant to a settlement there.

80. The outcome was intended to be the same, as the earlier discussed example transactions showed.

81. As the sample transactions show, the Defendants' tax line closely resembles or approximates the tax line of the hotels. In fact, the Defendants take steps to ensure that the practice was revenue neutral and yielded them the same money from their "taxes and fee" charges just as if they were collecting taxes on the retail charges without a service fee.

82. The Defendants' own employees questioned the OTCs' tax practices and recognized the problem they had under the law: "It's always a risk that as we educate the regulators or elected officials that they are better able to cook our goose."<sup>6</sup>

83. While the algorithms and resulting tax charges have been adjusted over time, the core features continue to share commonality on a number of key points: 1) there is a combined or bundled charge; 2) there is no disclosure about what amount of money is actually being paid in taxes; 3) the bundled tax charges resemble the amount of taxes at retail as charged by hoteliers and others so much so that it confuse(s) taxing authorities and consumers alike into believing that taxes are being collected and paid on the retail amounts when they are not; and 4) nobody can determine the amount of taxes actually being paid by the OTCs (unless they obtain the confidential internal OTC documents).

84. In sum, the Defendants create substantial "confusion and misunderstanding" by virtue of their presentation of hotel and tax charges to the customers, the use of formulas to

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<sup>6</sup> Orbitz Document cited in its Privilege Log Entry in the *City of Atlanta* Case and as cited in *Columbus, Georgia v. Orbitz, LLC*, Civil Action No. SU-06-CV-1895-05, slip. op. at p. 18 (Ga. Super. Ct., Jan. 30, 2007) (now vacated upon a joint request of the parties in conjunction with a payment of \$450,000 by Orbitz to settle with the City of Columbus) (emphasis added).

reverse engineer retail tax charges, and the net effect of these practices, which results in underpayment to New Hampshire.

85. The Consumer Protection Act provides that "[i]t shall be unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within this [S]tate." RSA 358-A:2. "'Trade' and 'commerce' shall include the . . . offering for sale, sale, or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity, or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this [S]tate." RSA 358-A:1, II. This includes New Hampshire residents which occupy New Hampshire hotel rooms acquired through the Defendants.

86. As shown in the public statements made by Defendants and in the allegations above concerning their tax calculation, collection, and remittance practices, Defendants have been utilizing unfair and deceptive trade practices for years within this State, which have substantially affected commerce to the detriment of the State, its residents, and its visitors and tourists. Consumers who rent hotel rooms or motor vehicles within New Hampshire have been taken advantage of by the Defendants in being charged and paying for tax line charges that, according to the Defendants, are not owed. These actions by the Defendants constitute unfair and deceptive acts and practices and are the type of practices prohibited by the Consumer Protection Act.

87. As stated earlier, the Attorney General is authorized to bring an action in the name of the state against any person whom the Attorney General has reason to believe is conducting or is about to conduct trade or commerce declared unlawful by the Consumer Protection Act, RSA chapter 358-A. See RSA 358-A:4, III(a). "Upon a finding that any person

has engaged or is engaging in any act or practice declared unlawful by this chapter, the court may make any necessary order or judgment and may award to the state civil penalties up to \$10,000 for each violation of this chapter." RSA 358-A:4, III(b). "The court shall determine the number of unlawful acts or practices which have occurred without regard to the number of persons affected thereby." *Id.*

88. The Defendants have used unfair and deceptive trade practices within New Hampshire for years with full knowledge that their actions are in violation of state and local tax codes across the nation, including New Hampshire's Meals and Rooms Tax.

**D. Defendants Refuse to Pay Assessments and Argue Threshold Legal Issues**

89. This is not a matter that should be dealt with at the administrative level. Taxing authorities around the country have repeatedly assessed and/or audited the Defendants. The Defendants have always denied legal liability and asserted constitutional defenses, and often try to tie up the matters in the administrative process for years. Defendants' representatives, in sworn testimony given in other cases pertaining to similar issues, have stated that Defendants have not paid and will not pay taxes, such as New Hampshire's Meals and Rooms Tax, prior to being ordered to do so by a Court.

90. For example, the Indiana Department of Revenue ("DOR") conducted an investigation and determined that Defendants should have collected and remitted Room Tax on the total amount the OTC collected from its customers for the years 2004-2006. Despite issuing proposed assessments for Room Tax and interest, the Indiana DOR was not paid following its audit and assessment. It was not until 2008 that a Letter of Findings was issued, many years after the initial audit and assessment was conducted. *See* Indiana Department of State Revenue,

Letter of Findings No. 08-0434 (2008), available at <http://www.in.gov/legislative/iac/20090218-IR-045090104NRA.xml.html>.

91. The State of Indiana has not been paid any taxes directly by the Defendants.

92. Additionally, the South Carolina Department of Revenue ("SC DOR") conducted an audit of an OTC defendant's records for a period from 2001 through 2006. After determining that the OTC was required to pay a tax on the gross proceeds received from furnishing hotel accommodations in South Carolina, the SC DOR issued an assessment and penalty. The OTC contested the assessment and penalty and tied up the matter in administrative hearings. Despite an order from the South Carolina Administrative Law Court ("ALC") that the OTC was required to pay the taxes, the OTC appealed. It was not until 2011 that the South Carolina Supreme Court issued an opinion affirming the ALC's decision. *See Travelscape, LLC v. S.C. Dep't of Rev.*, 391 S.C. 89, 705 S.E.2d 28 (SC 2011).

93. Expedia/Travelscape has not paid taxes to South Carolina for 2012 or 2013.

94. Besides Travelscape, the other OTCs have not paid any taxes to the State of South Carolina.

95. In both Indiana and South Carolina, the OTCs continue to use the merchant model and only remit "tax recovery charges" on the net rates.

96. Numerous Georgia local governments now represented in the *City of Rome* case previously sent multiple requests for information and assessments to the OTCs, but they were not paid and were forced to resort to litigation to collect the tax monies owed to the local governments. *See City of Rome v. Hotels.com*, 2007 U.S. Dist. LEXIS 98522 (N.D. Ga. 2007).

97. As demonstrated above, despite audits and assessments and attempts to resolve the matter administratively, Defendants employ a practice of stalling in order to evade the

payments of taxes owed to governments. Moreover, the threshold question, whether or not the online travel companies are subject to New Hampshire's Room Taxes, is one of law and does not require the Department of Revenue's expertise. It presents a question of law peculiarly within judicial competence, and judicial economy would be served where the legal issues involved would be resolved with less expense and more efficiently and expeditiously within the judicial system.

## **V. CAUSES OF ACTION**

### **COUNT I: DECLARATORY JUDGMENT**

98. The State incorporates each of the allegations in Sections I through IV above by reference as if fully rewritten herein.

99. Defendants have been and continue to be deceptively and unlawfully collecting tax charges at or above the retail rate within New Hampshire while only paying taxes on wholesale rates. Defendants cannot hide an additional and illegal profit stream under the guise of "taxes and fees." The violations are simple and extremely harmful to the Meals and Rooms Tax and those who travel to and stay in New Hampshire. Tax dollars that should be flowing to New Hampshire's general fund, unincorporated towns, unorganized places, towns, and cities are being diverted into Defendants' out-of-state coffers.

100. All of the above outlined conduct is illegal and threatens the integrity of the Meals and Rooms Tax Law. If this practice of collecting money as "taxes and fees" with no separate itemization and generally only a partial remission continues, other businesses may decide to only pay New Hampshire taxes at wholesale rates while charging customers (supposed) "taxes" at retail. If taken to the extreme, other businesses may decide to consider most of their charges to the public to be non-taxable services and only remit taxes on a small portion of their revenues.

101. Under this erroneous view, a Holiday Inn could decide to charge \$100 dollars for the rental of a room, collect "taxes and fees" on the \$100, but later remit Meals and Rooms Tax on the overnight accommodation of only a single dollar of that transaction and pocket the rest of the "taxes and fees" as a service fee. This is not the law.

102. The law requires transparent tax administration and full payment of the Meals and Rooms Tax on the gross amounts.

103. When Marriott rents a room on its online website, it charges and collects and remits Meals and Rooms Tax based on the retail rate; however, when an OTC rents a Marriott room on its website, it charges and collects the Tax and other hotel taxes at or above the retail rate, but remits on a lesser wholesale rate. The same is true in the motor vehicle rental scenario. When Hertz rents a motor vehicle on its online website, it charges and collects and remits Meals and Rooms Tax based on the retail rate; however, when an OTC rents a Hertz motor vehicle on its website, it charges and collects the Tax and other motor vehicle rental taxes at or above the retail rate, but typically only remits on a lesser wholesale rate.<sup>7</sup> This is fundamentally wrong. The rule of law must be imposed and these Defendants must be brought in line with other renters of hotel rooms, so that New Hampshire's revenues can be returned to the proper levels under the law.

104. The State seeks a declaratory judgment against all Defendants finding Defendants' business practices within New Hampshire as to the collection of the Meals and Rooms Tax illegal, deceptive, unlawful and in violation of the laws and ordinances designated herein.

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<sup>7</sup> Sometimes no taxes are paid at all, as so-called "breakage" transactions occur with merchant model car rentals, as with hotel bookings.

105. Further, the State seeks a declaratory judgment from the Court asking it to declare the rights and obligations of the Defendants with respect to the State relating to their Meals and Rooms Tax Law obligations under the sections cited herein. Specifically, the State seeks a judgment declaring that Defendants are subject to the applicable provisions of the Meals Rooms Tax Law and further declaring that Defendants are legally required to collect Meals and Rooms Tax on the gross amount paid by the transient guests who obtain New Hampshire rooms through Defendants and that Defendants are required to remit to New Hampshire the tax charges collected by Defendants on the gross amounts paid by transient guests.

106. A justifiable controversy is stated herein concerning the Defendants' Meals and Rooms Tax liability.

107. Such a declaratory judgment is proper. *See* RSA 491:22 ("Any person claiming a present legal or equitable right or title may maintain a petition against any person claiming adversely to such right or title to determine the question as between the parties, and the court's judgment or decree thereon shall be conclusive").

## **COUNT II: INJUNCTIVE RELIEF**

108. The State incorporates each of the allegations in Sections I through IV above by reference as if fully rewritten herein.

109. Defendants continue and will continue their business practices within New Hampshire pertaining to the underpayment of and failure to pay (in the case of "breakage") Meals and Rooms Tax on hotel rooms and motor vehicle rentals. Defendants' representatives, in sworn testimony given in other cases pertaining to similar issues, have stated that Defendants have not paid and will not pay taxes, such as New Hampshire's Meals and Rooms Tax, prior to being ordered to do so by a Court.

110. Based upon this and other sworn testimony, there is a substantial likelihood that New Hampshire will prevail upon the merits of this case when tried.

111. Further, the State has incurred and will continue to incur irreparable harm from the Defendants' failure and refusal to pay the full amount of taxes due to the State secondary to their merchant model business practices within the State. Meals and Rooms Tax revenues provide funding for the general fund as well as unincorporated towns, unorganized places, towns and cities in the State. Notwithstanding the possibility of ascertaining the amount of tax charges collected by Defendants and not remitted to the State, the State is unable to measure the harm caused to it and its citizens from the diversion of these funds away from their intended purpose(s). Until appropriate relief is granted, the State will continue to lose the benefits provided by these taxes and these lost opportunities cannot be remedied solely by monetary damages.

112. The balance of harms is entirely in favor of the State. The ultimate taxpayers are the New Hampshire hotel guests, and the Defendants are acting as their agents and as tax collection agents when they charge and collect tax dollars from those guests. All retail tax charges should be remitted. Because that is not occurring, the State is deprived of needed and vital revenue resources which would benefit its citizens, whereas Defendants are collecting, but refusing to pay over moneys collected from the ultimate taxpayers.

113. The utilization of taxes for the support of New Hampshire tourism and related economic development is well recognized as social policy.

114. Therefore, the State respectfully asks that the Court enjoin Defendants from further, future violation of the Meals and Rooms Tax Law and that Defendants be ordered to:

(1) collect said taxes on the gross amount paid to them by the consumer (transient guest or motor

vehicle user) to whom they rent New Hampshire rooms and/or motor vehicles picked up in New Hampshire; (2) identify, categorize/itemize and quantify to the State the Meals and Rooms Tax due and being paid; (3) and remit the proper amount (including in "breakage" situations).

### **COUNT III: VIOLATIONS OF NEW HAMPSHIRE'S MEALS AND ROOMS TAX LAW**

115. The State incorporates each of the allegations in Sections I through IV above by reference as if fully rewritten herein.

116. As set forth above, the Meals and Rooms Tax Law includes a "tax of 9 percent of the rent is imposed upon each occupancy." RSA 78-A:6, I.

117. Also as set forth above, the Meals and Rooms Tax Law includes a vehicle rental tax of "a tax of 9 percent. . . upon the gross rental receipt of each rental." RSA 78-A:6, II-a.

118. The operator, who is responsible for collecting the tax from the occupant, "shall either state the amount of the tax to each occupant, purchaser of a meal, or renter, or state that the tax is included in the price of the occupancy, meal, or gross rental receipts received" and, "[i]f the amount of the gratuity is not separately stated, the purchaser's or occupant's contract or receipt shall include the following language: 'The 9 percent tax on meals and rooms is included for the costs of meals and lodging only.'" See 78-A:7, I.

119. Upon request, the operator must tell the purchaser, occupant or renter the amount of the tax if the tax is included in the price of the occupancy. See RSA 78-A:7, I(b).

120. As shown in their public statements and as alleged herein, the Defendants are engaged in the business of selling/renting hotel rooms and motor vehicles within the State. They contract with hotels and motor vehicle suppliers to sell, and they do subsequently sell, New Hampshire hotel rooms and motor vehicles picked up in New Hampshire. Accordingly, the amount of the Meals and Rooms Tax on hotel rooms and motor vehicles sold/rented in New

Hampshire by Defendants should be correctly calculated as a percentage of the *gross amount* each consumer pays to Defendants for a hotel room or motor vehicle rental. And that is the amount each Defendant is required to collect and remit to the State.

121. Upon information and belief, Defendants are charging to and collecting Meals and Rooms Tax from consumers within the State that are not being remitted to the State. The tax charges are being paid by the New Hampshire consumer to Defendants and ostensibly collected on behalf of New Hampshire, but the Defendants are remitting only part of the money due as Meals and Rooms Tax. Further, they are not adding the Meals and Rooms Tax separately to the sales price but are deceptively hiding illegal profit streams under labels such as "taxes" or "taxes or fees" or "tax recovery charges."

122. The State seeks the restoration of transparency as addressed above, and the payment of all Meals and Rooms Tax monies that should have been paid to date based upon the retail rates Defendants charged New Hampshire consumers for the rental of hotel rooms and motor vehicles in New Hampshire, along with all applicable penalties, interest and attorney fees.

#### **COUNT IV: VIOLATIONS OF NEW HAMPSHIRE'S CONSUMER PROTECTION ACT**

123. The State incorporates each of the allegations in Sections I through IV above by reference as if fully rewritten herein.

124. At all times alleged herein, Defendants employ within New Hampshire the practice of charging retail tax charges but only remitting taxes on the wholesale rate (and not even on that in the case of "breakage") and utilize the method of bundling such taxes with alleged fees in order to hide their deceptive and unfair trade practices. As detailed above, to accomplish their scheme, the Defendants employ algorithms and surcharges to reverse engineer retail taxes, while labeling them otherwise.

125. Such unfair and deceptive trade practices within New Hampshire and methods have caused economic loss and harm to the State, its residents, and consumers, and it would be in the interest of the public to enjoin the Defendants from continuing their deceptive actions. The State requests an order that Defendants be restrained by permanent injunction from the use of such confusing and misleading methods, acts, or practices.

126. In addition, Defendants have intentionally violated the provisions of the Consumer Protection Act, RSA chapter 358-A, in using such practices and methods within the State. In addition to seeking all damages allowed under such chapter, the State also requests an order finding that Defendants owe a sum up to ten thousand dollars for each violation of RSA chapter 358-A, in an amount to be determined by this Court.

#### **COUNT V: BREACH OF FIDUCIARY DUTY**

127. The State incorporates each of the allegations in Sections I through IV above by reference as if fully rewritten herein.

128. Through contracts with hotels, accommodations and/or motor vehicle suppliers for hotel rooms in New Hampshire and motor vehicles to be picked up in New Hampshire, Defendants have elected to collect the Meals and Rooms Tax.

129. Defendants choose to collect the New Hampshire Meals and Rooms Tax online, rather than having the New Hampshire customer pay the tax directly to the hotel, accommodation or motor vehicle supplier.

130. By collecting the Meals and Rooms Tax online, Defendants gain the confidence of the State and purport to act with the State's interest in mind.

131. Moreover, by collecting the Meals and Rooms Tax online, Defendants acquire influence over the State.

132. Defendants' choice to collect the Meals and Rooms Tax online creates a fiduciary duty between Defendants and the State because it results in the Defendants handling money that is not their own or for their own benefit, but instead is the money of the State and for the benefit of the State.

133. Defendants' choice to collect the Meals and Rooms Tax online also creates a fiduciary duty between Defendants and the customers from whom they collect the Tax, who are paying Defendants the Tax for the specific purpose that Defendants will pay them over to the State.

134. Defendants, in their sole discretion, combine taxes and fees in one lump sum, preventing their customers from ever seeing the amount they pay in Meals and Rooms Tax or the amount of markup Defendants are charging them.

135. By underpaying and, in the case of "breakage," not paying at all Meals and Rooms Tax to the State, Defendants have abused the State's influence, betrayed the State's confidence and breached their fiduciary duty to the State.

136. Moreover, by combining taxes and fees in one line item rather than separately stating them, Defendants are failing to provide transparency and accountability for the money entrusted in them by customers to pay over to the State and also the transparency and accountability required by the State.

#### **COUNT VI: ACCOUNTING**

137. The State incorporates each of the allegations in Sections I through IV above by reference as if fully rewritten herein.

138. As set forth in Count V above, Defendants have breached their fiduciary duty to the State and their own customers.

139. Discovery is necessary because Defendants have failed to provide transparency by combining together New Hampshire Meals and Rooms Tax and fee amounts.

140. Only Defendants know how much they have paid over to the hotels, other accommodations or motor vehicle suppliers in Meals and Rooms Tax verses what amounts they have kept for themselves in each New Hampshire transaction.

141. The true amounts the Defendants have pocketed in each New Hampshire transaction as well as the true amounts Defendants have paid over to hotels as Meals and Rooms Tax are crucial to the determination of any damage award against Defendants in this lawsuit and, as such, without them, there is no adequate remedy at law.

142. Further, because Defendants have sold, rented, booked and leased New Hampshire hotel rooms, other New Hampshire accommodations, and motor vehicles picked up in New Hampshire online to a multitude of customers traveling to Plaintiff over time, there exist mutual accounts which are of a complex nature.

143. As such, Plaintiff herein request that the trier of fact, in the exercise of sound discretion, require Defendants to provide an accounting of the total amounts they have collected from each customer in transactions resulting in hotel room stays, accommodation stays or motor vehicle rental pick-ups in the State from the beginning of the Meals and Rooms Tax Law forward, as well as the amount Defendants retained from each transaction and the amount Defendants remitted to the hotel, accommodation or motor vehicle supplier in each transaction for the Tax and the cost the hotel, accommodation or motor vehicle supplier charged Defendants for the room in the hotel, accommodation or motor vehicle rental.

## COUNT VII: CONVERSION

144. The State incorporates each of the allegations in Sections I through IV above by reference as if fully rewritten herein.

145. At all times alleged herein, the State had a property interest in the Tax Monies Due and Owing<sup>8</sup> in that it was and is the sole rightful owner.

146. Indeed, the Defendants hold the Meals and Rooms Tax they are required to collect in trust for the State. See RSA 78-A:20, I ("All taxes required to be paid by operators, and all increases, interest, and penalty on the taxes, become from the time due and payable to the commissioner of revenue administration a personal debt for the operator liable to pay them to the state to be recovered in an action of debt.").

147. In collecting taxes on the retail rate but only remitting taxes on the wholesale rate or not at all in the case of "breakage" for hotel room, accommodation and/or motor vehicle rentals occurring within the State, Defendants intentionally exercised dominion and control over the Tax Monies Due and Owing which so seriously interfered with the right of the State to control such Monies that Defendants may justly be required to pay the State such Monies.

## COUNT VIII: UNJUST ENRICHMENT

148. The State incorporates each of the allegations in Sections I through IV above by reference as if fully rewritten herein.

149. In unlawfully collecting the Meals and Rooms Tax but failing to remit the tax on the retail amount including in "breakage" situations for hotel room, accommodation and/or motor vehicle rentals within the State, Defendants have wrongfully received a benefit that it would be unconscionable for them to retain.

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<sup>8</sup> "Tax Monies Due and Owing" herein refers to the underpaid and underpaid (as in the situation of "breakage") Meals and Rooms Tax claimed herein.

150. Retention of the tax monies by Defendants is a monetary benefit conferred upon Defendants by the State, of which the Defendants are aware and appreciate. It would be inequitable for the Defendants to retain the benefit of these tax dollars rightfully owed to the State and its citizens where Defendants have wrongfully pocketed such funds in violation of New Hampshire's laws and where Defendants have knowingly and intentionally accepted and retained such benefits. Under the principles of equity, Defendants must be disgorged of said collected but un-remitted taxes which in equity and good conscience belong to the State and its citizens.

#### **COUNT IX: ASSUMPSIT FOR MONEY HAD AND RECEIVED**

151. The State incorporates each of the allegations in Sections I through IV above by reference as if fully rewritten herein.

152. By selling and renting rooms and motor vehicles within the State, Defendants were obligated by law and, therefore, promised to collect the Meals and Rooms Tax and remit such taxes on the retail amount to the State, including but not limited to in "breakage" situations. Defendants have breached that promise and damaged Plaintiff in the amount of the Tax Monies Due and Owing by collecting the Meals and Rooms Tax, but unlawfully failing to remit the tax charges on the retail amount to the State. As such, under the principles of equity, Defendants must be disgorged of said collected but un-remitted taxes which in equity and good conscience belong to the State and its citizens.

#### **COUNT X: CIVIL CONSPIRACY**

153. The State incorporates each of the allegations in Sections I through IV above by reference as if fully rewritten herein.

154. Defendants worked together to unlawfully deprive the State of the Tax Monies Due and Owing. Defendants had an agreement on this course of action and committed the

unlawful acts of collecting Meals and Rooms Tax on the retail rate and only remitting taxes on the wholesale rate, or not at all in the case of "breakage," for hotel room, accommodation and/or motor vehicle rentals within the State to achieve this collective object to be achieved. As a proximate result of these unlawful and concerted acts within the State, the State has suffered damages, including the deprivation of the Tax Monies Due and Owing. Therefore, Defendants are liable for the acts of civil conspiracy.

#### **COUNT XI: IMPOSITION OF A CONSTRUCTIVE TRUST**

155. The State incorporates each of the allegations in Sections I through IV above by reference as if fully rewritten herein.

156. Defendants and the State had a confidential relationship in that the State justifiably believed that the Defendants would act in its best interest. Specifically, Defendants owed a duty imposed by law and also a fiduciary duty to the State to collect the Tax Monies Due and Owing for hotel room, accommodations and/or motor vehicle rentals within the State. In connection with that duty, Defendants received money belonging to the State that they would be unjustly enriched in retaining even if it they had obtained it honestly, which they did not.

157. By virtue of Defendants' actions, Defendants hold the Tax Monies Due and Owing as constructive trustee for the benefit of the State. The State requests an order that Defendants be directed to give possession thereof to the State.

#### **COUNT XII: DAMAGES**

158. The State incorporates each of the above allegations by reference as if fully rewritten herein.

159. The State requests that the Court order Defendants to provide restitution to it and to disgorge the Tax Monies Due and Owing to the State.

160. Under New Hampshire law, the State is entitled to interest and penalties on the unpaid and underpaid Meals and Rooms Tax.

161. The State requests that it recover all penalties, interest, costs and reasonable and necessary attorneys' fees it is entitled to under the law and in equity, including, but not limited to, those provided under the Meals and Rooms Tax Law, RSA chapter 78-A, and the Consumer Protection Act, RSA chapter 358-A.

162. The State requests both prejudgment and post-judgment interest at the maximum rate allowed by law.

#### **PRAYER FOR RELIEF**

WHEREFORE, the State of New Hampshire prays for the following judgment in its favor against Defendants in accordance with all code sections and rules of the State:

- A. For judgment against Defendants and in favor of the State on all claims asserted in this Complaint;
- B. For a judgment declaring that Defendants are subject to the applicable provisions of the Meals and Rooms Tax relative to the hotel and motor vehicle sales/rentals, and further declaring that Defendants are legally required to collect such taxes on the gross amounts paid by the transient guests who obtain rooms and renters who obtain motor vehicles through Defendants and that Defendants are required to remit to the State the taxes collected by Defendants on the gross amount paid by transient guests and motor vehicle renters including, but not limited to, "breakage" amounts;
- C. For injunctive relief requiring Defendants' future compliance with the State's tax laws;

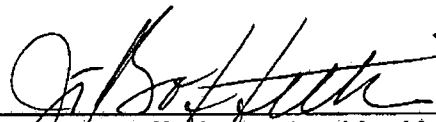
- D. For a permanent injunction restraining Defendants from continuing their trade practices of charging and collecting retail tax charges but only remitting taxes on the wholesale price and restraining Defendants from continuing their method of hiding such practices by bundling such taxes with alleged fees (as well as from continuing to collect and retain "breakage" amounts);
- E. For a civil penalty in a sum not exceeding \$10,000 per violation of the Consumer Protection Act committed by the Defendants;
- F. For payments of all Meals and Rooms Tax monies due to the State including, but not limited to, "breakage;"
- G. For disgorgement and restitution plus interest due thereon at the legal rate and/or as established by the State;
- H. For an accounting;
- I. For payment of all monies being held by Defendants as constructive trustee for the State;
- J. For prejudgment and post judgment interest to the extent allowed by law;
- K. For penalties and fines as allowed by law;
- L. For costs of this action;
- M. For reasonable and necessary attorney's fees incurred herein; and
- N. For such other and further relief as this Court may deem appropriate.

Respectfully submitted, this 16th day of October, 2013.

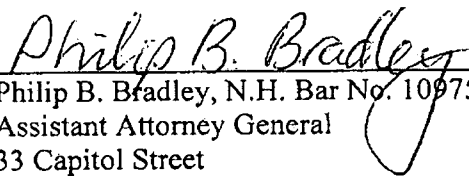
THE STATE OF NEW HAMPSHIRE,

By its attorneys,

Joseph A. Foster  
Attorney General



James T. Boffetti, N.H. Bar No. 9948  
Senior Assistant Attorney General  
Consumer Protection and Antitrust Bureau  
33 Capitol Street  
Concord, NH 03301  
Phone: (603) 271-3643  
Facsimile: (603) 223-6227  
[james.boffetti@doj.nh.gov](mailto:james.boffetti@doj.nh.gov)



Philip B. Bradley, N.H. Bar No. 10975  
Assistant Attorney General  
33 Capitol Street  
Concord, NH 03301  
Phone: (603) 271-3679  
Facsimile: (603) 223-6271  
[philip.bradley@doj.nh.gov](mailto:philip.bradley@doj.nh.gov)

The following attorneys will seek admission *pro hac vice*:

John W. Crongeyer, Georgia Bar No. 196264  
Crongeyer Law Firm, P.C.  
2170 Defoor Hills Road, NW  
Atlanta, GA 30318  
Phone: (404) 542-6205  
Facsimile: (404) 872-3745  
[jwc@birdlawgroup.com](mailto:jwc@birdlawgroup.com)

(continued on next page)

William Q. Bird, Georgia Bar No. 057900  
Kristen L. Beightol, Georgia Bar No. 425814  
Bird Law Group, P.C.  
2170 Defoor Hills Road, NW  
Atlanta, GA 30318  
Phone: (404) 873-4696  
Facsimile: (404) 872-3745  
[wqb@birdlawgroup.com](mailto:wqb@birdlawgroup.com)  
[klb@birdlawgroup.com](mailto:klb@birdlawgroup.com)

Robert K. Finnell, Georgia Bar No. 261575  
The Finnell Firm  
One West Fourth Avenue, Suite 200  
Post Office Box 63  
Rome, GA 30162  
Phone: (706) 235-7272  
Facsimile: (706) 235-9461  
[bob@finnellfirm.com](mailto:bob@finnellfirm.com)

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# EXHIBIT A

# IHG.com Booking

## Holiday Inn Concord Downtown

### Your Hotel



Concord Downtown  
172 North Main Street,  
Concord, New Hampshire  
United States 03301

### Your Stay

Jun-24-2013 to Jun-25-2013  
1 Adult, 1 Room

1 KING BED LEISURE NONSMOKING  
2 PERSON(S) MAX PER ROOM

### Rate Description and Rate Rules

Rate Type: Best Flexible Rate

Rate Description: Take advantage of our best and least restrictive publicly available rate. Changes to your reservation are usually acceptable, but always check the hotel's cancellation policy before booking for cancellation fees that may apply depending upon arrival date and hotel selected.

Cancellation Policy: Canceling your reservation before 4:00 PM (local hotel time) on Monday, 24 June, 2013 will result in no charge. Canceling your reservation after 4:00 PM (local hotel time) on 24 June, 2013, or failing to show, will result in a charge of 1 night per room to your credit card. Taxes may apply. Failing to call or show before check-out time after the first night of a reservation will result in cancellation of the remainder of your reservation.

Average Nightly Rate \$ 139.00 USD per room, per night

Mon 24 Jun 2013	\$ 139.00 <u>USD</u> per night (1 room(s))
Total Tax \$	\$ 12.51 <u>USD</u>
Estimated Total Price \$	\$ 151.51 <u>USD</u>

Tax: 9% per night not included in rate effective 24 June, 2013 thru 25 June, 2013 **LODGING TAX.**

Parking: Hotel has additional parking across Storrs Street (behind the hotel).  
Valet Parking Available

Pet Policy: Pets not allowed.

## Expedia.com Booking

### Holiday Inn Concord Downtown



#### Trip Summary



Holiday Inn Concord  
Downtown  
Concord, NH

1 Room: One King Bed, Non-Smoking

1 Night: Jun/24/2013 - Jun/25/2013

Room 1: 2 Adults

1 Night

Taxes & Fees

avg./night

\$139.00

\$12.93

Trip Total: \$151.93

#### What are Taxes & Service Fees?

The taxes are tax recovery charges Expedia pays to its vendors (e.g. hotels); for details, please see our Terms of Use. We retain our service fees and compensation in servicing your travel reservation.

## **PREPAID HOTEL RESERVATIONS**

You acknowledge that the Expedia Companies pre-negotiate certain room rates with hotel suppliers to facilitate the booking of reservations on your behalf. You also acknowledge that the Expedia Companies provide you services to facilitate such booking of reservations for a consideration (the "facilitation fee"). The room rate displayed on the Website is a combination of the pre-negotiated room rate for rooms reserved on your behalf by the Expedia Companies and the facilitation fee retained by the Expedia Companies for their services. You authorize the Expedia Companies to book reservations for the total reservation price, which includes the room rate displayed on the Website, plus tax recovery charges, service fees, and where applicable, taxes on the Expedia Companies' services. You agree that your credit card will be charged by the Expedia Companies for the total reservation price. Upon submitting your reservation request you authorize the Expedia Companies to facilitate hotel reservations on your behalf, including making payment arrangements with hotel suppliers.

You acknowledge that except as provided below with respect to tax obligations on the amounts we retain for our services, the Expedia Companies do not collect taxes for remittance to applicable taxing authorities. The tax recovery charges on prepaid hotel transactions are a recovery of the estimated taxes (e.g. sales and use, occupancy, room tax, excise tax, value added tax, etc) that the Expedia Companies pay to the hotel supplier for taxes due on the hotel's rental rate for the room. The hotel suppliers invoice the Expedia Companies for tax amounts. The hotel suppliers are responsible for remitting applicable taxes to the applicable taxing jurisdictions. None of the Expedia Companies act as co-vendors with the supplier with whom we book or reserve our customer's travel arrangements. Taxability and the appropriate tax rate vary greatly by location. The actual tax amounts paid by the Expedia Companies to the hotel suppliers may vary from the tax recovery charge amounts, depending upon the rates, taxability, etc. in effect at the time of the actual use of the hotel by our customers. We retain service fees as additional compensation in servicing your travel reservation. Service fees retained by the Expedia Companies for their services vary based on the amount and type of hotel reservation.

# EXHIBIT B

# IHG.com Booking

## Holiday Inn Concord Downtown

### Your Hotel



Concord Downtown  
172 North Main Street,  
Concord, New Hampshire  
United States 03301

### Your Stay

Jun-24-2013 to Jun-25-2013  
1 Adult, 1 Room

1 KING BED LEISURE NONSMOKING  
2 PERSON(S) MAX PER ROOM

### Rate Description and Rate Rules

Rate Type: Best Flexible Rate

**Rate Description:** Take advantage of our best and least restrictive publicly available rate. Changes to your reservation are usually acceptable, but always check the hotel's cancellation policy before booking for cancellation fees that may apply depending upon arrival date and hotel selected.

**Cancellation Policy:** Canceling your reservation before 4:00 PM (local hotel time) on Monday, 24 June, 2013 will result in no charge. Canceling your reservation after 4:00 PM (local hotel time) on 24 June, 2013, or failing to show, will result in a charge of 1 night per room to your credit card. Taxes may apply. Failing to call or show before check-out time after the first night of a reservation will result in cancellation of the remainder of your reservation.

Average Nightly Rate \$ 139.00 USD per room, per night

Mon 24 Jun 2013	\$ 139.00 <u>USD</u> per night (1 room(s))
Total Tax ‡	\$ 12.51 <u>USD</u>
Estimated Total Price ‡	\$ 151.51 <u>USD</u>

Tax: 9% per night not included in rate effective 24 June, 2013 thru 25 June, 2013 **LODGING TAX.**

**Parking:** Hotel has additional parking across Storrs Street (behind the hotel).

Valet Parking Available

**Pet Policy:** Pets not allowed.

# Orbitz.com Booking

## Holiday Inn Concord Downtown



### Holiday Inn CONCORD DOWNTOWN

★★★★★

Check-in: Mon, Jun 24, 2013 03:00 PM

Check-out: Tue, Jun 25, 2013 11:00 AM

[Overview](#) [Description](#) [Photos](#) [Map](#) [Amenities](#)



Reviewer score **3.1** out of 5 11 reviews

172 NORTH MAIN STREET, CONCORD, NH 03301

1.9 miles Southeast from the center of Concord

#### Trip cost

##### Hotel (1 night)

1 guest	
\$139.00 avg/night	\$139.00
Price Assurance	FREE
Taxes and fees	\$11.26

**Total due at booking \$150.26**



Print

### Hotel Taxes and Fees

Orbitz allows you to search for hotel rooms and other travel products on our site and to purchase those travel products from providers at your convenience.

We market hotel rooms to you on our site under two different models. Under one model, you book the room through us based on a published rate and pay the hotel directly (usually at check-out, although a deposit or full payment in advance may be required by the hotel). Under the "prepaid" model (sometimes called the "merchant" or "net" rate model), you pay upfront and we handle your payment to the hotel. We are not the provider of the hotel rooms under either model, and we do not collect taxes or remit to taxing authorities. Amounts displayed in the "Taxes and Fees" line for prepaid hotel transactions include an estimated amount we expect the hotel to bill for applicable taxes, governmental fees and other charges that the hotels must pay to the government. In addition, the "Taxes and Fees" line includes a fee we charge and retain in exchange for the services we provide in facilitating your transaction with the hotel supplier.

Please note that you may also incur other charges that we do not collect and are not included in the quoted price, such as hotel resort fees, hotel energy surcharges, parking fees, pet fees, and incidentals, directly by the hotel unless otherwise indicated on the site.

Prepaid transactions for hotels located in Canada are being made available through Orbitz, a U.S. company, and therefore, are not eligible for a refund of Canadian Goods and Services Tax (GST).

# EXHIBIT C

# IHG.com Booking

## Holiday Inn Concord Downtown

### Your Hotel



Concord Downtown  
172 North Main Street,  
Concord, New Hampshire  
United States 03301

### Your Stay

Jun-24-2013 to Jun-25-2013

1 Adult, 1 Room

1 KING BED LEISURE NONSMOKING  
2 PERSON(S) MAX PER ROOM

### Rate Description and Rate Rules

Rate Type: Best Flexible Rate

Rate Description: Take advantage of our best and least restrictive publicly available rate. Changes to your reservation are usually acceptable, but always check the hotel's cancellation policy before booking for cancellation fees that may apply depending upon arrival date and hotel selected.

Cancellation Policy: Canceling your reservation before 4:00 PM (local hotel time) on Monday, 24 June, 2013 will result in no charge. Canceling your reservation after 4:00 PM (local hotel time) on 24 June, 2013, or failing to show, will result in a charge of 1 night per room to your credit card. Taxes may apply. Failing to call or show before check-out time after the first night of a reservation will result in cancellation of the remainder of your reservation.

Average Nightly Rate \$ 139.00 USD per room, per night

Mon 24 Jun 2013	\$ 139.00 <u>USD</u> per night (1 room(s))
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Total Tax ‡	\$ 12.51 <u>USD</u>
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Estimated Total Price ‡	\$ 151.51 <u>USD</u>
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Tax: 9% per night not included in rate effective 24 June, 2013 thru 25 June, 2013 LODGING TAX.

Parking: Hotel has additional parking across Storrs Street (behind the hotel).

Valet Parking Available

Pet Policy: Pets not allowed.

# Priceline.com Booking

## Holiday Inn Concord Downtown

**priceline.com**

flights | hotels | rental cars | vacation packages | cruises | tours & attractions | pricebreaker deals | hotel guides | groups

### Holiday Inn Concord Downtown



★★★

172 North Main Street  
Concord, NH 03301



Check-In: Mon, Jun 24, 2013  
Check-Out: Tue, Jun 25, 2013  
Nights: 1 Nights  
Rooms: 1 Room

Room1:

Room Type: 1 King Bed Leisure Nonsmoking

FREE Cancellation: until 12:00 PM on 06/22/2013

Hotel Freebies: Free internet in room and free parking

### Summary of Charges

Book Online or Call 1-877-477-8544

Try click to chat

Room Cost:	\$139.00	
avg. per room, per night		
Rooms:	1	
Nights:	1	
Room Subtotal:	\$139.00	
Taxes & Fees:	\$12.85	We've chopped fees on this hotel.
Total Charges:	\$151.85	Best Price Guarantee on this hotel
prices are in US dollars		

#### **Charges for Taxes and Fees**

In connection with facilitating your hotel transaction, the charge to your debit or credit card will include a charge for Taxes and Fees. This charge includes an estimated amount to recover the amount we pay to the hotel in connection with your reservation for taxes owed by the hotel including, without limitation, sales and use tax, occupancy tax, room tax, excise tax, value added tax and/or other similar taxes. In certain locations, the tax amount may also include government imposed service fees or other fees not paid directly to the taxing authorities but required by law to be collected by the hotel. The amount paid to the hotel in connection with your reservation for taxes may vary from the amount we estimate and include in the charge to you. The balance of the charge for Taxes and Fees is a fee we retain as part of the compensation for our services and to cover the costs of your reservation, including, for example, customer service costs. The charge for Taxes and Fees varies based on a number of factors including, without limitation, the amount we pay the hotel and the location of the hotel where you will be staying, and may include profit that we retain.

Except as described below, we are not the vendor collecting and remitting taxes to the applicable taxing authorities. Our hotel suppliers, as vendors, include all applicable taxes in the amount billed to us and we pay over such amounts directly to the vendors. We are not a co-vendor associated with the vendor with whom we book or reserve our customer's travel arrangements. Taxability and the appropriate tax rate and the type of applicable taxes vary greatly by location.

For transactions involving hotels located within certain jurisdictions, the charge to your debit or credit card for Taxes and Fees includes a payment of tax that we are required to collect and remit to the jurisdiction for tax owed on amounts we retain as compensation for our services.

Please note that we are unable to facilitate a rebate of Canadian Goods and Services Tax ("GST") for customers booking Canadian hotel accommodations utilizing our services.

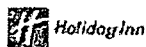
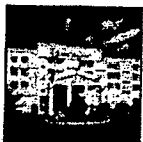
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# EXHIBIT D

## IHG.com Booking

### Holiday Inn Concord Downtown

#### Your Hotel



Concord Downtown  
172 North Main Street,  
Concord, New Hampshire  
United States 03301

#### Your Stay

Jun-24-2013 to Jun-25-2013  
1 Adult, 1 Room

1 KING BED LEISURE NONSMOKING  
2 PERSON(S) MAX PER ROOM

#### Rate Description and Rate Rules

Rate Type: Best Flexible Rate

**Rate Description:** Take advantage of our best and least restrictive publicly available rate. Changes to your reservation are usually acceptable, but always check the hotel's cancellation policy before booking for cancellation fees that may apply depending upon arrival date and hotel selected.

**Cancellation Policy:** Canceling your reservation before 4:00 PM (local hotel time) on Monday, 24 June, 2013 will result in no charge. Canceling your reservation after 4:00 PM (local hotel time) on 24 June, 2013, or failing to show, will result in a charge of 1 night per room to your credit card. Taxes may apply. Failing to call or show before check-out time after the first night of a reservation will result in cancellation of the remainder of your reservation.

**Average Nightly Rate** \$ 139.00 USD per room, per night

Mon 24 Jun 2013 \$ 139.00 USD per night (1 room(s))

Total Tax \$ \$ 12.51 USD

Estimated Total Price \$ \$ 151.51 USD


**Tax:** 9% per night not included in rate effective 24 June, 2013 thru 25 June, 2013 **LODGING TAX.**

**Parking:** Hotel has additional parking across Storrs Street (behind the hotel).  
Valet Parking Available

**Pet Policy:** Pets not allowed.

# Travelocity.com Booking

## Holiday Inn Concord Downtown



[Home](#)[Vacation Packages](#)[Flights](#)[Hotels](#)[Cars/Rail](#)[Cruises](#)[Travel Deals](#)[Activities](#)

Your Trip: 1 Adult

Hotel: 1 Room, 1 Night

Mon, Jun 24

Check In

Tue, Jun 25

Check Out

Holiday Inn Concord Downtown - Concord, NH

Room: 1 (1 Adult)

1 King Bed Leisure Nonsmoking


Hotel: \$151.51

[Change Hotel](#)

Concord Activities - Customize Your Trip

Other Services (1)

Other Services



Donate to The Conservation Fund to Offset Your Trip

☒ Offset your trip's environmental impact here!

When you book with Travelocity, you can help zero out the greenhouse gas emissions created by your trip by making a contribution to The Conservation Fund's Go ZeroE program... [More](#)

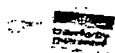
Prices starting at \$2.00

[Dates & Times](#)

[Back to top](#)

Price Information

Hotel: 1 Room, 1 Night	\$139.00
Tax, Recovery Charge & Service Fees	\$12.51
Total:	\$151.51



### Information About Taxes, Governmental Fees, Tax Recovery Charges and Service Fees

Please review the following information carefully from time to time as it is subject to change.

#### HOTEL TRANSACTIONS

We market hotel rooms on the site under two different business models. The first is the "postpaid" model (also known as the "published rate" or "traditional agency" model), where you book a room through us at published rates and you pay for that room, plus any applicable taxes, governmental fees and other charges directly to the hotel at check-out. The second business model is the "prepaid" model (also known as the "net rate" or "merchant" model), where we collect payment from you up front and then transmit funds to the hotel. We label the "prepaid" model rooms as "GoodBuy" rooms on our site because they are covered by our Low Rate Guarantee. Amounts displayed as the nightly rate for GoodBuy hotel transactions consist of the amount that the relevant hotel has agreed to accept for the room, plus a Facilitation Fee that we retain to compensate us for facilitating your travel arrangements. Amounts displayed in the "Tax Recovery Charge & Service Fees" line for GoodBuy hotel transactions consist of the amount that we expect the relevant hotel to charge for any applicable taxes, governmental fees and other charges (a "Tax Recovery Charge"), plus a Processing Service Fee that we retain to compensate us for processing your travel reservation through our system. For hotels located in certain jurisdictions, such as Atlanta, Baltimore and New York State, the Tax Recovery Charge also includes taxes on our Facilitation Fees and/or our Processing Service Fees that we are required to collect and remit to those jurisdictions. Combining the Tax Recovery Charge with our Processing Service Fee enables us to maintain the opaque nature of the "prepaid" rate. Note that at the time your hotel reservation is made, we can only estimate the amount that the relevant hotel will collect for applicable taxes, governmental fees and other charges; we will pay the full amount of those charges in any event. Please note that we are unable to facilitate a rebate of Canadian Goods and Services Tax (GST) for customers booking Canadian hotel accommodations using our services. Also, remember that you may incur other charges during your stay that are not payable to us and are not included in the quoted price, such as extra-person or extra-bed charges, resort fees, gratuities, hotel energy surcharges, parking fees, telephone fees, room service, movies, mini-bar, and incidentals.